Supreme Court, U.S.
FILED

97 876 NOV 24 1997

OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM 1997

DONALD R. BIRGEL
Petitioner

v.

BOARD OF COMMISSIONERS OF
BUTLER COUNTY, OHIO
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID A. CALDWELL
(*Counsel of Record*)
2500 Cincinnati Commerce Center
Cincinnati, Ohio 45202
(513) 852-6031
Attorney for Petitioner

4888

QUESTION PRESENTED FOR REVIEW

Where a federal district court sitting in diversity dismisses an action under the doctrine of "law of the case" based upon dicta contained in a prior state appeals court opinion rendered in a separate action involving the same claim between the same parties, without determining whether or not the state court opinion represents state law, has the district court fulfilled its duty under *Erie Railroad Co. v. Tomkins* 304 U.S. 64 (1938)?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY INVOLVED .. 2

STATEMENT OF THE CASE 3

A. NATURE OF THE CASE AND HISTORY OF PROCEEDINGS 3

B. STATEMENT OF FACTS 5

REASON FOR GRANTING THE WRIT 8

A. LAW OF THE CASE 8

B. RES JUDICATA 11

CONCLUSION 15

APPENDIX A1

United States Court of Appeals for the Sixth Circuit opinion issued September 16, 1997 .....A1

United States District Court for the Southern District of Ohio judgment entered July 17, 1996.....A13

United States District Court for the Southern District of Ohio order issued May 7, 1996.....A16

United States District Court for the Southern District of Ohio Show cause order issued April 12, 1996.....A18

Ohio Court of Appeals for the Twelfth Appellate District opinion and judgment entered January 30, 1995.....A20

Court of Common Pleas of Butler County, Ohio opinion and judgment entered February 3, 1994.....A23

TABLE OF AUTHORITIES

Board of Health of St. Bernard v. City of St. Bernard
19 Ohio St. 49 (1969) 12
Celebreeze v. Netzley
51 Ohio St. 3d (1990) 8
Clay Hyder Trucking Lines, Inc. v. Riley
16 Ohio App. 3d 224 (1984) 14
Employees Own Federal Credit Union v. City of Defiance
752 F.2d 243 (6th Cir. 1985) 11
Erie Railroad Co. v. Tomkins
304 U.S. 64 (1938) 10, 15
Gilbert v. Braniff International Corp.
579 F.2d 411 (7th Cir. 1978) 15
Great Lakes Dredge and Dock Company v. Tanker
957 F.2d 1575 (11th Cir. 1992) 9
Harbor Insurance Company v. Essman
918 F.2d 734 (8th Cir. 1990) 9
Harper Plastics, Inc. v. Amoco Chemicals Corp.
657 F.2d 939, 943 (7th Cir. 1981) 13
King v. Order of Travelers
333 U.S. 153 (1948) 10
Marshall v. Aaron
15 Ohio St. 3d 48 (1984) 8
McGatrick v. Wason
4 Ohio St. 566 12
Migra v. Warren City School District Board of Education
465 U.S. 75, 104 S.Ct. 892 (1984) 12
Rekhi v. Wildwood Industries, Inc.
61 F.3d 1313 (7th Cir. 1995) 9
Society of Separationists, Inc. v. Herman
939 F.2d 1207 (5th Cir. 1991) 9
Stoner v. New York Life Insurance Company
311 U.S. 464 (1940) 10
Standard Oil Company v. Grice
46 Ohio App. 2d 97 (1975) 14

Torres v. Sears
68 Ohio App. 2d 87 (1980).....14
Winchester Homes, Inc. v. Osmose Wood Preserving, Inc.
37 F.3d 1053 (4th Cir. 1994).....14

STATUTES AND OTHER AUTHORITIES

28 U.S.C. Section 1254(1).....2

Article IV, Section 1 United States Constitution.....2

28 U.S.C. Section 1738.....2

Ohio Rule of Civil Procedure 41(A)(1)(a).....2

Moore's Federal Practice, ¶0.404[7].....10

Ohio Supreme Court Rule 2(G)(1) for the Reporting of Opinions 11

Ohio Revised Code Section 2323.05(A).....12

The Restatement (Second) of Judgments Section 13.....13

IN THE

Supreme Court of the United States

DONALD R. BIRGEL
Petitioner

v.

BOARD OF COMMISSIONERS OF BUTLER COUNTY OHIO
Respondent

PETITION FOR WRIT OF CERTIORARI
to the
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Donald R. Birgel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

United States Court of Appeals for the Sixth Circuit opinion issued September 16, 1997 appears in the appendix beginning on page A1.

United States District Court for the Southern District of Ohio judgment entered July 17, 1996 appears in the appendix beginning on page A13.

United States District Court for the Southern District of Ohio order issued May 7, 1996 appears in the appendix beginning on page A16.

United States District Court for the Southern District of Ohio Show Cause Order issued April 12, 1996 appears in the appendix beginning on page A18.

Ohio Court of Appeals for the Twelfth Appellate District opinion and judgment issued January 30, 1995 appears in the

appendix beginning on page A20.

Court of Common Pleas of Butler County, Ohio opinion and judgment entered February 3, 1994 appears in the appendix beginning on page A23.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1997 and this Petition is filed within 90 days thereafter. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Sec. 1 United States Constitution:
"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

U.S.C. Section 1738:
". . . Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state, territory or possession from which they are taken."

Ohio Rules of Civil Procedure
"Rule 41. Dismissal of actions.
A. Voluntary Dismissal: Effect thereof.

(1) By plaintiff; by stipulation. Subject to the provisions of Rule 23(E) and Rule 66, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by the defendant

. . . Unless otherwise stated in the notice of dismissal. . . The dismissal is without prejudice, . . . "

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND HISTORY OF THE PROCEEDINGS.

On August 18, 1992, petitioner, Donald R. Birgel, filed an action in the Court of Common Pleas of Butler County, Ohio alleging breach of contract. This action was docketed under No. CV92-08-1482. On November 9, 1993 Birgel filed a motion for partial summary judgment requesting that the court find that the contract of the county was not subject to competitive bidding requirements as set forth in Ohio Revised Code §307.86 and further that the defendant's recision of his contract constituted a breach of contract.

On February 3, 1994 the state trial court issued its opinion finding that the contract was not subject to the competitive bidding requirements of O.R.C. §307.86 and further finding that Birgel did not have a contract and that there was no breach of contract. The court thereupon entered summary judgment for the defendant although the defendant had not filed a motion for summary judgment.

Birgel perfected an appeal to the Ohio Court of Appeals for the Twelfth District Case No. CA94-02-042. Birgel's only assignment of error was as follows:

> "The trial court erred in entering summary judgment in favor of the defendant who did not file a motion seeking summary judgment."

The Court of Appeals sustained Birgel's only assignment of error, reversed and remanded the case to the trial court for further proceedings. In its opinion the Court of Appeals also made the following observation regarding the merits of the case:

> "While the materials submitted by the plaintiff in support of his motion for summary judgment were inadequate to establish an enforceable contract, he may have been able

to amend his complaint to frame a cause of action for the damages he incurred as a result of the faulty bidding procedure."

The above quotation was the entire statement of the Ohio Court of Appeals regarding the merits of the case. There is no analysis of the facts, no citation of authority, and no explanation as to why an offer and an acceptance did not create a contract. Birgel had in the meantime moved to the State of Michigan, creating diversity of citizenship. Birgel thereupon filed a notice of dismissal without prejudice under Ohio Rule of Civil Procedure 41(A)(1)(a) and filed the present action in the United States District Court for the Southern District of Ohio, Western Division, Case No. 95-00063.

Birgel filed a motion for partial summary judgment on the breach of contract issue on March 1, 1996. On April 12, 1996 the district court issued a "show cause" order, finding that Birgel's breach of contract claim was barred under the doctrine of *res judicata*. Birgel was directed to show cause within fifteen days why the action should not be dismissed. Birgel did respond, pointing out that *res judicata* was inapplicable under Ohio law in view of the fact that there was no final judgment in favor of the defendant.

On May 7, 1996 the district court issued its order finding that Birgel's claim was not barred by *res judicata*. The court also made the following order:

"The court concludes that the legal issue of whether the parties entered into a contract is a significant threshold issue in the matter. The resolution of that issue may eliminate the necessity of a trial; however, the issue has not been fully briefed by the parties. Accordingly, the court hereby vacates the final pretrial and trial dates in this matter and directs defendant to file a motion for summary judgment on plaintiff's breach of contract claim on or before May 31, 1996."

Defendant thereupon filed a motion for summary judgment arguing only the law of the case doctrine. Defendant did not brief the contract issue. On July 17, 1996 the district court

entered judgment for defendant finding that Birgel's claim was barred by the doctrine of law of the case, without any examination of the contract issue. An appeal was perfected to the United States Court of Appeals for the Sixth Circuit on August 14, 1996. On September 16, 1997 the Court of Appeals affirmed the district court holding that Birgel was precluded from relitigating in federal court the issues which it thought were previously decided by the Ohio Court of Appeals, basing its decision both on law of the case and also *res judicata*.

B. STATEMENT OF FACTS

In the fall of 1990 the Butler County Commissioners considered the adoption of a disability income insurance plan for county employees with the premiums to be paid by the employees through payroll deduction. Initially, the Commissioners had considered only the employees of the Department of Human Services since this department was the subject of pending union negotiations. Specifications for the insurance were drawn with that department in mind. Later the Commissioners decided to offer the program to all county employees and the employees of the various elected officials.

On December 21, 1990 Richard Law, County Purchasing Director, forwarded a copy of the proposed specifications to Assistant Prosecutor Patrick Connelly requesting an opinion as to whether the procurement of this insurance was required to be on the basis of competitive bidding. On January 15, 1991 Connelly replied to Mr. Law's inquiry, giving the opinion that under Ohio Revised Code §307.86, competitive bidding was required. Connelly's letter also contained the following statement:

> "We believe that if the commissioners decide to investigate the option of disability insurance for its employees it should generally follow the form and specifications contained in the Department of Human Services invitation for bid."

Connelly's letter was forwarded to the commissioners and

they interpreted the above quoted statement as an approval of the specifications. Using those specifications, the commissioners advertised for bids on January 29, 1991, February 5, 1991 and the bids were opened on February 14, 1991. There were three bidders: Donald R. Birgel, Robert Frohman and Jay McCarty. Birgel's bid proposed to cover all of the county employees other than sheriff's deputies through Monarch Life Insurance Co. and the sheriff's deputies were to be covered through Benefit Trust Life Insurance Co. On March 28, 1991 the county commissioners adopted a resolution awarding the disability insurance contract to Donald R. Birgel.

Shortly after the award was made, a disappointed bidder, Jay McCarty, complained to the Assistant Prosecutor, Pat Connelly about the specifications. McCarty also approached county commissioner Henry Helton and told Helton that he could assure his re-election if he would cooperate in setting aside Birgel's contract.

On May 24, 1991 County Administrator Derek L. Conklin telephoned Donald Birgel and instructed him to stop selling the insurance because the county was going to rebid the contract. By this time Birgel had contacted 350 county employees and 197 of those contacted had signed up for the insurance.

The commissioners took no official action until September 24, 1991 when the board adopted a resolution rescinding its previous award of the contract to Birgel. The commissioners' action was based solely on Connelly's opinion and not on any dissatisfaction with Birgel's performance. County Commissioner Henry Helton testified in his deposition as follows:

> "Q. Am I correct that the commissioners rescinded that bid solely on the basis of Connelly's opinion?
>
> A. Yes sir.
>
> Q. The commissioners had no other complaint with Birgel's performance, did they?
>
> A. No sir, Don Birgel has saved this county literally millions of dollars."

After rescinding Birgel's contract, the commissioners re-

advertised for bids which were opened on December 19, 1991. The commissioners ultimately accepted the bid of Mense Brothers. After the rebidding and the award of the new contract to the Mense Brothers most of the employees who had purchased insurance from Birgel dropped the coverage.

REASONS FOR GRANTING THE WRIT

IN DECIDING THIS CASE THE SIXTH CIRCUIT HAS APPLIED THE LAW OF THE CASE DOCTRINE IN A MANNER WHICH CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND CONFUSES THAT DOCTRINE WITH *RES JUDICATA.*

A. LAW OF THE CASE

In determining whether the decision of the Ohio Court of Appeals constitutes law of the case, it is necessary to examine precisely what issues were before the court which were capable of being decided. The Common Pleas Court had before it only Plaintiff's motion for partial summary judgment. The trial court judgment overruled plaintiff's motion and entered summary judgment in favor of the defendant[1]. Under Ohio law, a court is not permitted to grant summary judgment in favor of a party who did not file a motion (*Marshall v. Aaron*, 15 Ohio St. 3d 48, (1984). Birgel appealed only the granting of summary judgment in favor of the defendant because the overruling of a motion for summary judgment is not appealable in Ohio (*Celebreeze v. Netzley* 51 Ohio St. 3d 89, 1990).

Birgel's only assignment of error in the Ohio Court of Appeals was the following:

> "The trial court erred in entering summary judgment in favor of the defendant who did not file a motion seeking summary judgment."

Thus, the only matter before the Ohio Court of Appeals was the procedural issue as to the propriety of granting sum-

---

[1]The Court of Appeals characterized the trial court judgment as a dismissal for failure to state a claim under Civ. 12(B)(6) and noted that: "this raises a much narrower procedural issue." This statement is simply incorrect. The trial court opinion obviously considered and referred to the evidence which was set forth in depositions filed with the court.

mary judgment in favor of a non-moving defendant. The statement of the Court of Appeals as to the merits of plaintiff's case is therefore nothing more than dicta which does not establish law of the case.

In *Great Lakes Dredge and Dock Company v. Tanker*, 957 F.2d 1575 (11th Cir. 1992) the court refused to consider its prior opinion on an earlier appeal in the case as law of the case because the issue which it had discussed was not actually before the court and was therefore dicta.

The Fifth Circuit in *Society of Separationists, Inc. v. Herman* 939 F.2d 1207 (5th Cir. 1991) refused to accord law of the case status to its own prior opinion in another case involving the same plaintiff:

> "For one thing, this language, barren of citation and argument, is of no decisional value; it is simply obiter dicta."

The opinion of the Ohio Court of Appeals of course suffers from the same infirmity; it was simply a cryptic statement on an issue which was not before the court, containing no analysis, no reasoning and no citation of authority. As such, it could not constitute law of the case.

The court in *Society of Separationists, Inc.* also refused to apply law of the case because the prior proceeding was not the same case:

> "Finally, for the sake of completeness, we mention law of the case. This doctrine is applicable only "during the pendency of . . . a single proceeding, and operates to foreclose re-examination of decided issues either on remand or on the subsequent appeal." Murray and the case before us are altogether separate proceedings, so law of the case is inapplicable."

Harbor Insurance Company v. Essman, 918 F.2d 734 (8th Cir. 1990) and *Rekhi v. Wildwood Industries, Inc.*, 61 F.3d 1313 (7th Cir. 1995) both refused to apply law of the case principles to rulings made in separate cases between the same parties, holding that law of the case only applies to prior rulings made in the same case. *Rekhi* involved a prior state court action while *Harbor Insurance* involved a prior federal

district court case.

In the present case the Sixth Circuit held that law of the case does apply to the prior state court action citing this court's decision in *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940) and 1(B) Moore's Federal Practice, ¶0.404[7]. However, this court did not apply law of the case to the prior state court ruling in *Stoner*. While it held that the federal court in the later action was bound to follow those decisions, it did so only after examining those decisions and comparing them with other reported Missouri cases in order to determine that the prior rulings were in fact a correct expression of state law. This court thus was merely applying the rule of *Erie Railroad Company v. Tomkins*, 304 U.S. 64 (1938). This is precisely what we asked the Sixth Circuit to do, but it refused, holding that it was barred from examining the state court decision. This is an improper application of the law of the case doctrine and the holding of the Sixth Circuit below conflicts directly with *Stoner* and the other circuit decisions cited above.

The Sixth Circuit also cited Moore's Federal Practice for the proposition that law of the case does apply to separate actions. The material quoted in note 3 of the opinion is apparently taken from the second edition. The statement does not appear in the third edition, published in 1997, and we can only conclude that the authors no longer consider that statement authoritative.[2]

King v. Order of Travelers, 333 U.S. 153 (1948) was an action to recover under an accidental death insurance policy which contained an aviation exclusion. The decedent had made a successful emergency ditching at sea but drowned several hours later. The federal district court held that the widow was entitled to recover, finding that the death was not aviation related. Shortly after the decision in the district court,

---

[2]The court apparently has the third edition since it is quoted in the concurring opinion.

a South Carolina trial court entered a similar judgment in favor of the widow, interpreting an identical exclusion clause contained in another policy. The Court of Appeals held that there was no controlling South Carolina Supreme Court precedent and determined that the district court judgment was in error and reversed. This court held that the Court of Appeals was not bound to follow the state trial court decision under the principles of *Erie* because that decision was not precedent in the State of South Carolina except between the parties. The decision of the Ohio Court of Appeals in the present case also is not binding precedent. Rule 2 (G) (1) of the Ohio Supreme Court Rules for the Reporting of Opinions provides that an unpublished opinion of a court of appeals is not controlling anywhere in the State of Ohio except between the parties to the case. The *King* case, like *Stoner*, was not applying law of the case but merely assuring the proper application of the *Erie* doctrine. Applying *King* to the facts of the present case, it is obvious that the Sixth Circuit should not have considered the decision of the Ohio Court of Appeals to be binding precedent since it contained no citation of authority and, being unpublished, was not binding precedent anywhere in the State of Ohio.

B. RES JUDICATA

It is not altogether clear from the opinion whether the decision of the Sixth Circuit in the present case was based solely upon law of the case or also upon *res judicata*. The Sixth Circuit placed extensive reliance upon its own decision in *Employees Own Federal Credit Union v. City of Defiance*, 752 F.2d 743 (6th Cir. 1985). The credit union had sued the city in an Ohio state court alleging the violation of its constitutional rights. The state trial court had issued an opinion granting the defendant's Rule 12(B)(6) motion to dismiss and instructed the defendant to prepare a judgment entry. Prior to the actual entry of judgment the plaintiff voluntarily dismissed the action without prejudice under Ohio Rule of Civil Procedure 41(A)(1)(a). Plaintiff then filed a suit for

damages under 42 U.S.C. §1983 in the federal district court. The district court granted the defendant's motion for summary judgment, holding that the prior state court case was *res judicata* so as to bar the federal action.

In affirming, the Sixth Circuit recognized that it was bound, under the holding in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S. Ct. 892, (1984) to give the state court judgment the same preclusive effect as would be given that judgment under the law of the State of Ohio based upon the requirement of the Full Faith and Credit clause of the United States Constitution, Article IV, Section 1 and 28 U.S.C. Section 1738.

However, the Sixth Circuit violated the holding in *Migra*, and ignored Ohio law in applying its own rules of preclusion.

Board of Health of St. Bernard v. City of St. Bernard, 19 Ohio St. 49 (1969) was an action in mandamus which had been filed in the Ohio Court of Appeals. The Court of Appeals heard the matter on the defendant's demurrer. The Court of Appeals sustained the demurrer and granted the plaintiff 20 days to amend. Instead of amending, plaintiff presented an entry of dismissal without prejudice. The Court of Appeals refused to journalize the plaintiff's entry and instead dismissed the case with prejudice. In reversing, the Supreme Court of Ohio held at syllabus 1:

> "Where a demurrer to apetition is sustained and leave granted to plead further, petitioner has an absolute right, under Section 2323.05(A) Revised Code, to dismiss the action without prejudice within the time given to plead further. (*McGatrick v. Wason*, 4 Ohio St. 566, approved and followed.)"

The Sixth Circuit distinguished *St. Bernard* on the basis of the statement of the Ohio Supreme Court in its opinion that the decision on the demurrer was "not on the merits". This distinction was somewhat remarkable in that the procedural posture of the *St. Bernard* case was precisely the same as in the case before them. The court apparently misunderstood the Supreme Court's statement. At the time of the *St. Bernard*

decision, Ohio's pleading code permitted a plaintiff to dismiss without prejudice at anytime prior to submission of the case to the jury or the court at the completion of trial. Defendant's counsel, (the writer's law partner) had argued that the case had actually been submitted to the court of appeals for a decision following trial, because of the fact that a written stipulation of facts had been filed. The Supreme Court rejected this argument with the unfortunate statement that the decision was "not on the merits". What the court actually meant was that a trial had not commenced and plaintiff's right to dismiss without prejudice had not expired. Although the Court of Appeals had not made any factual determination, the decision was certainly on the merits since it was rendered upon a consideration of the legal claim as distinguished from consideration of jurisdiction or some purely procedural ground. (Moore's Federal Practice 3d Edition, ¶131.30[3][a]).[3]

After refusing to follow *St. Bernard*, the court looked to "general principles of res judicata," and applied the Restatement (Second) of Judgments Section 13:

> ". . . for purposes of issue preclusion (as distinguished from merger and bar) 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."

---

[3]Moore's Federal Practice *Id.* notes that: "The principle that a judgment must be on the merits before it can be the basis for claim preclusion was established long ago. Modern opinions continue to refer to the principle. However, the term is misleading, because many dispositions short of trial are considered "on the merits" for claim preclusion purposes even though the validity of some or all of the theories of liability, claims for relief, and defenses of the parties may remain undetermined. For this reason, the Restatement (Second) of Judgments abandoned the term "because of its misleading connotations." See also *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 943 (7th Cir. 1981).

The court thereupon stated, without further analysis, that the state court determination was "sufficiently firm" to be conclusive. In the present case the court also applied the "sufficiently firm" standard to the Ohio Court of Appeals decision despite the lack of a final entered judgment, again ignoring Ohio law. *St. Bernard* makes it clear that the Ohio Supreme Court does not consider such a determination to be "sufficiently firm" so as to be conclusive.

Standard Oil Company v. Grice, 68 Ohio App.2d 97 (1975), *Torres v. Sears Roebuck & Co.*, 68 Ohio App.2d 87 (1980), and *Clay Hyder Trucking Lines, Inc. v. Riley*, 16 Ohio App.3d 224 (1984) have applied the same rule as that set forth in *St. Bernard* to cases arising since the adoption of the Ohio Rules of Civil Procedure.

The dissent in *Employees Own Federal Credit Union* pointed out the fact that the majority decision violated the holding in *St. Bernard.*

The Sixth Circuit holdings in *Employees Own Federal Credit Union* and in the present case are in direct conflct with the decision of the Fourth Circuit in *Winchester Homes, Inc. v. Osmose Wood Preserving, Inc.*, 37 F.3d 1053 (4th Cir. 1994). That case was an action by a builder against the manufacturer of allegedly defective building materials, asserting various warranty claims. A prior action had been filed in the state court of Virginia. The state court judge had announced at a hearing that he was entering summary judgment for the defendant. Prior to the actual entry of judgment, the plaintiff filed a motion for a non-suit which under Virginia practice is the equivalent of a dismissal without prejudice. The state court entered the non-suit but thereafter vacated the entry and dismissed with prejudice. Plaintiff thereafter refiled the action in federal district court. The district court dismissed the plaintiff's action, holding that the state court judgment was law of the case. The Fourth Circuit reversed, holding that the plaintiff had an absolute right, under Virginia law, to take a non-suit and for this reason the state court judgment was neither law of the case nor *res judicata.*

Gilbert v. Braniff International Corp. 579 F.2d 411 (7th Cir. 1978) (cited in the Restatement, supra) also conflicts with the Sixth Circuit holdings. In a prior state court action the trial court had dismissed plaintiff's action but granted 28 days in which to amend the complaint. Instead of amending, plaintiff filed a new action in federal court. The district court granted summary judgment on the basis of *res judicata.* In reversing, the Seventh Circuit held that the state court determination was not a "final judgment" which would support *res judicata.*

CONCLUSION

The Sixth Circuit has applied the law of the case doctrine to prior state court rulings in such a fashion as to prevent a federal district court from ascertaining whether the prior state court ruling correctly applies state law. This interpretation of the law of the case doctrine effectively prevents the district court from complying with the dictates of *Erie Railroad v. Tomkins.* Moreover, this application of the law of the case doctrine conflicts with the decisions of other circuits and also with prior decisions of this court.

The decision of the Sixth Circuit also applies the doctrine of *res judicata* in a manner which violates the Full Faith and Credit clause of the U.S. Constitution, 28 U.S.C. §1738 and also conflicts with the decisions of other circuits.

The decisions of all of the circuits regarding the law of the case doctrine as applied to prior state court rulings is a patchwork quilt of conflicting and inconsistent holdings. This is an issue which arises in many diversity cases and there is an urgent need for this court to grant certiorari and establish consistent rules for the application of the doctrine and for the determination of the preclusive effect of prior state court rulings.

DAVID A. CALDWELL (0000954)
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202
Counsel of Record for the Petitioner

ELECTRONIC CITATION: 1997 FED App. 0277P (6thCir.)
File Name: 97a0277p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD R. BIRGEL,
Plaintiff- Appellant

v. No. 96-3895

BOARD OF COMMISSIONERS OF
BUTLER COUNTY, OHIO,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 95-00063--Sandra S. Beckwith, District Judge.
Argued: August 5, 1997
Decided and filed: September 16, 1997
Before: Kennedy, Contie, and Cole, Circuit Judges.

COUNSEL

Argued: David Alan Caldwell, WOOD & LAMPING Cincinnati, Ohio, for Appellant. Jack Clyne McGowen SCHEPER & MCGOWEN, Hamilton, Ohio, for Appellee.
On Brief: David Alan Caldwell, WOOD & LAMPING Cincinnati, Ohio for Appellant. Jack Clyne McGowen SCHEPER & MCGOWEN, Hamilton, Ohio, for Appellee.

OPINION

KENNEDY, Circuit Judge. Plaintiff, Donald R. Birgel, appeals from the District Court's order granting summary judgment to defendant, Board of Commissioners of Butler County, Ohio, in this diversity action for breach of contract. For the reasons set forth below, we conclude that plaintiff is precluded from relitigating in federal court the issues previously decided by a state court. The judgment of the District Court is therefore, AFFIRMED.

I

In early 1991, the Board of Commissioners of Butler County

("Board") adopted a plan to provide county employees with access to disability insurance. Following the opinion of an assistant prosecuting attorney for Butler County, the Board followed the competitive bidding procedures of Ohio Revised Code §§307.86 - .921. On January 29, 1991, and February 5, 1991, the Board sought bids for the project through advertisements. The bids were opened on February 14, 1991; plaintiff an insurance agent, submitted a bid which was accepted by the Board on March 28, 1991. Over fifty percent of the 350 employees Birgel contacted purchased the insurance coverage offered by him. The County deducted the premiums for the insurance from the employee's payrolls.

Following the Board's acceptance of plaintiff's bid, at least one unsuccessful bidder complained to the prosecutor's office that the notice of the bidding procedure was defective. On September 24, 1991, pursuant to the complaints and the opinion of the prosecutor's office, that the bidding specifications were defective,[1] the Board rescinded their acceptance of Birgel's bid and instituted a new bidding process. When the Board readvertised for bids, a bid of another party was accepted.

As a result of the Board's recission of Birgel's bid, Birgel instituted an action in the Court of Common Pleas of Butler County, Ohio, against the Board of Commissioners of Butler County alleging breach of contract. On February 3, 1994, the state court granted summary judgment on behalf of the defendant[2] on the grounds that the alleged contract for disability insurance was not subject to the competitive bidding require-

---

[1]The prosecutor's office alleged that Birgel's bid failed to include written provisions for the county's law enforcement officers. Apparently, Birgel submitted a bid utilizing Monarch Insurance Company which did not include the law enforcement officers, Birgel's bid contemplated utilizing a separate insurance policy for the officers which was not submitted with Birgel's bid.

[2]The defendant did not file a motion for summary judgment. Rather, following the plaintiff's partial motion for summary judgment, the court entered judgment on behalf of the defendant.

ment of R.C. §307.86 and that, because Birgel had no contract with the Board, his claim for breach of contract was meritless.

On appeal, the Ohio Court of Appeals treated the trial court's dismissal as one for failure to state a claim and held as follows:

> "When judgment was entered, the cause was pending upon nothing more than Birgel's motion for a summary judgment, and . . . .this court is of the opinion that the motion was properly overruled by the common pleas court. However such action did not conclude the matter, and the subsequent dismissal of the action without notice was premature.
>
> While the materials submitted by the plaintiff in support of his motion for summary judgment were inadequate to establish an enforceable contract, he may have been able to amend his complaint to frame a cause of action for the damages he incurred as a result of the faulty bidding procedure. In other words, it does not appear beyond doubt that Birgel can prove no set of facts which might support his claim for damages in some amount.
>
> A dismissal under either Civ. R. 12(B)(6) or Civ. R. 56 operates as an adjudication on the merits, and even though the failure of the appellant to present sufficient evidence to support the existence of a contract substantially depreciates his claim for relief, he was nevertheless entitled to notice of the action that the trial court intended to take.
>
> Accordingly, and in order to afford appellant an opportunity to be heard as to any remaining issue, in the case, the judgment must be reversed and the cause remanded to the common pleas court for a resumption of the proceedings at the juncture where the assignment of error is sustained."

Subsequently, Birgel voluntarily dismissed his case and filed the present action in the United States District Court for the Southern District of Ohio on February 2, 1995 alleging the

identical contract claim. On March 1, 1996, Birgel filed a partial motion [*sic*] for summary judgment on the issue of liability. On April 12, 1996, the District Court issued a show cause order as to whether the case should be dismissed under the doctrine of *res judicata*. Following receipt of plaintiff's response to the show cause order, the District Court, on May 7, 1996, held that the case was not bared [*sic*] by *res judicata* because there was no final judgment in state court. The court then ordered the defendant to file a motion for summary judgment regarding plaintiff's breach of contract claim. Following the filing of defendant's motion for summary judgment, the District Court, on July 17, 1996, granted summary judgment on behalf of the defendant on the ground that plaintiff's claim for breach of contract was barred by the law of the case doctrine. Plaintiff appeals from the order granting summary judgment on behalf of the defendant.

II.

Our standard of review of a grant of summary judgment is *de novo;* we use the same test as used by the district court. *See Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir. 1991). We view the evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment is proper if the evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to [a] judgment as a matter of law." *See* Fed. R. Civ. P. 56(c); *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988)(quoting Fed. R. Civ. P. 56(c)).

III.

The District Court was correct in concluding that Birgel is barred from bringing the current action for breach of contract in federal court. We so conclude, however, with somewhat different reasoning than that used by the District Court. The District Court ultimately concluded that plaintiff's case was barred by the law of the case citing an unpublished decision of

our Court, *Ellison v. Empire General Life Insurance Co.*, No. 89-3879, 1990 WL 191630 (6th Cir. Dec. 3, 1990), which relied on the doctrine of law of the case to bar an action in federal court. While the plaintiff in *Ellison* did voluntarily dismiss an action she had commenced in state court for recovery of insurance proceeds following a remand by the state appellate court, plaintiff did not file her second action in federal court. Rather, plaintiff instituted a second action in state court which the defendant removed to federal court. *Id.* at * 2. It has been the practice of several federal courts to apply the law of the case doctrine when a state court action has been removed to federal court. *See, e.g., Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1317-18 (7th Cir. 1995) ("It would be a far different matter if Rekhi's state court suit had been removed or otherwise transferred to federal court. The doctrine of law of the case would apply, for it would be the same suit, albeit in different courts. But that is not what happened. Rekhi started over [in federal court]."); *Redfield v. Continental Cas. Corp.*, 818 F.2d 596, 605 (7th Cir. 1987) ("Although the law of the case doctrine is most commonly applied to govern the standard of litigation on remand after an appeal, the doctrine also applies when a state court action is removed to federal court"); *see also* 1B Moore's Federal Practice ¶ 0.404[6], at 501.

In the instant case, however, the defendant did not remove Birgel's action to federal court; rather, Birgel voluntarily dismissed his state court action and filed a new action in federal court. We conclude, nevertheless, that Birgel is bound by the pronouncements of the Ohio Court of Appeals pursuant to the Supreme Court's decision in *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940). In *Stoner*, Lewis Stoner brought suit in a Missouri state court seeking payment of disability benefits due from the defendant insurance company. Following a verdict for New York Life, the state appellate court held that the evidence was sufficient to take the case to the jury but that certain jury instructions were erroneous. It, accordingly, remanded the case for a new trial. *Id.* at 466.

Stoner unsuccessfully sought a writ of certiorari from the Missouri Supreme Court. Two years after the filing of his first suit, but before retrial of the action, Stoner instituted two more actions in Missouri state courts to recover disability benefits which had accrued since the institution of the first action. *Id.* One action was tried and Stoner obtained a favorable verdict. On appeal, the appellate court reversed because of incorrect jury instructions but again held that the evidence was sufficient to reach the jury. Accordingly, the court remanded the case for a new trial. *Id.*

Before any of these actions were retried, the insurance company filed an action in federal district court seeking a declaratory judgment that Stoner was not totally disabled under the disability plan. *Id.* The district court's verdict in favor of Stoner was reversed by the Eighth Circuit on the ground that Stoner was not totally disabled. The Supreme Court held that the Eighth Circuit erred in failing to follow the two decisions of the state court of appeals which had held there was a sufficient jury question as to whether Stoner was disabled. In doing so, the Court, citing *Erie Railroad Co. v. Tomkins,* 304 U.S. 64 (1938), stated:

> . . . where jurisdiction rests on diversity, federal courts must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently. *In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties,* and the highest court of the state has refused review. Twice the Kansas City Court of Appeals had before it appeals involving the same parties, insurance contracts, and facts as are involved here. . .Each time the Kansas City Court of Appeals expressly stated that the evidence as to total disability presented a question for the jury.

Id. at 467-68 internal citations omitted)(emphasis added). While the Supreme Court held the federal court was bound to apply the decisions of the state appellate court, it did not say

under what doctrine, beyond *Erie*, it was bound to do so. Whether *Stoner* was employing law of the case,[3] *Erie Railroad v. Tomkins*, or instead some form of *res judicata* or collateral estoppel is unclear. Ordinarily, *res judicata* and collateral estoppel both require a final judgment which was not present in *Stoner* and is technically not present in the current action. Our Court, however, has applied collateral estoppel even where a final judgment has not been entered. In *Employee's Own Federal Credit Union v. City of Defiance*, 752 F.2d 243 (6th Cir. 1985), plaintiff filed suit in Ohio State court alleging a violation of its federal constitutional rights when defendant refused to provide water service to a building site plaintiff intended to purchase while defendant later provided water service to the same site purchased by another entity. The state court addressed the merits of the claim and granted the defendant's motion to dismiss. Before the trial court entered judgment for the defendant, the court permitted plaintiff time to file an amended complaint. Instead of amending its complaint, the plaintiff voluntarily dismissed the action and brought an identical action in federal court. *Id.* at 244.

Without Ohio law on point, our Court looked to general principles of collateral estoppel and specifically to The Restatement (Second) of Judgments § 132 at 132 (1982) which provides, " . . . for purposes of issue preclusion (as as distinguished from merger and bar), final judgment includes

---

[3]Moore's Federal Practice is of the opinion that law of the case does apply to a case begun anew in federal court because of the principle underlying *Erie Railroad Co. v. Tomkins*, 304 U.S. 64 (1938):

> in a non-federal matter where the state substantive rule has been established in state court litigation that is still pending or has been been dismissed without prejudice, the state rule constitutes the law of the case in another action in the federal court involving the same matter and the same parties . . . unless, of course, the rule enunciated no longer represents the state law.

1B Moore's Federal Practice ¶ 0.404[7], at 521. As support for this conclusion, Moore cites to *Stoner*.

any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."*Employees Own Federal Credit Union*, 752 F.2d at 245. Adhering to that language, our Court concluded that, because the state court "issued an opinion with detailed findings of fact and conclusions of law based on pretrial affidavits, depositions, and trial briefs . . . that decision is "sufficiently firm to be accorded conclusive effect." *Id.* The court further reasoned that plaintiff had a full and fair opportunity to litigate its claim in state court; thus, it saw no reason "to allow a party to get an adverse judgment in state court and turn around and sue on the same claim in federal court. One bite at the apple is enough." *Id*

With the guidance of both *Stoner* and *Employees Own Credit Union*, we conclude the District Court correctly declined to decide anew the question of whether Birgel has stated a cause of action for breach of contract. As in *Stoner*, the state appellate court, while remanding the case to the state trial court, arrived at a conclusive decision as to plaintiff's breach of contract claim. In the court's opinion, plaintiff's pleading and proof were insufficient to state a cause of action for breach of contract, The appellate court only remanded the case to afford Birgel an opportunity to construct a theory of recovery other than breach of contract to recoup any damages he may have incurred. *See United States v. Harris Trust & Sav. Bank* 470 F2d 6 (7th Cir. 1972)(In a suit to collect federal estate taxes, where the state supreme court had three times held that a will was to be interpreted in two thirds of decedant's trust esate being a determinable fee, the declarations of the state supreme court were binding in the federal court case).

As in *Employees Own Federal Credit Union*, despite the lack of a final entered judgment, the Ohio Court of Appeals has spoken "sufficiently firm" and, therefore, conclusively on the issue of whether plaintiff may maintain an action for breach of contract on the facts alleged by the plaintiff. As we noted in *Employees Own Federal Credit Union*, we will not

permit a plaintiff to abandon his failing state court suit and file a virtually identical suit in federal court in hopes of achieving a more favorable result.

IV.

For the foregoing reasons, the judgment of the District Court is AFFIRMED.

CONCURRENCE

CONTIE, Circuit Judge, concurring. The district court dismissed Donald R. Birgel's breach of contract action against the Butler County Board of Commissioners pursuant to the law of the case doctrine. Because the law of the case doctrine necessitates the dismissal of this action, and because I am of the opinion that the majority does not directly reference whether it relies on the law of the case doctrine, res judicata, collateral estoppel, or some other jurisdictional doctrine derived from *Stoner v. New York Life Insurance Co.* and *Erie Railroad Co. v. Tomkins* to dismiss this action, I write separately.

The law of the case doctrine dictates that findings made at one point in the litigation become binding precedent to be followed in successive stages of the same litigation. *Arizona v. California,* 460 U.S. 605, 618 (1983); *United States v. Moored,* 38 F.3d 1419, 1421 (6th Cir. 1994). This doctrine protects against the relitigation of settled issues and preserves the finality of judgments. Though Birgel argues that the law of the case doctrine is inapplicable because he dismissed his state court action and filed a new action (*i.e.,* not the "same litigation") in *United States v. Todd,* 920 F.2d 399 (6th Cir. 1990), this court held:

> Under the doctrine of the law of the case, a decision on an issue made by a court at one stage of a case should be given effect in successive stages of the same litigation. This doctrine applies with equal vigor to the decisions of a coordinate court in the same case and to a court's own decisions. The purpose of this doctrine is twofold: (1) to prevent the continued litigation of settled issues; and (2)

> to assure complance by inferior courts with the decisions of superior courts . . . .
>
> Finally, we note that the law-of-the-case doctrine can be applied to rulings made in a case that ends in a mistrial. Otherwise, a court would be required to rule *de novo* on every issue previously decided in a prior proceeding that ends in a mistrial. This would be inefficient, particularly when the previous trial had progressed considerably. In such a situation, the law-of-the-case doctrine would prove useful. A court may recognize and enforce prior rulings based on this doctrine, but also retains the power to reconsider previously decided issues as they arise in the context of a new trial."

Id. at 403-04 (citations and footnote omitted). Because the law of the case doctrine can be applied to rulings that are made in a case that ends in a mistrial, *id.*, I see little reason to deny the applicability of the law of the case doctrine to this action where the determinative issue was decided by a state appellate court in an earlier action between the same parties prior to the voluntary dismissal of the state court action. *See* Moore's Federal Practice § 134.22[3][c][iii] (3d ed. 1997) ("In some cases, giving law of the case effect to a state court's determination of an issue will be especially appropriate because the state court determination will be the best evidence available of what the law of the state is. In such Circumstances, a federal judge may properly give greater deference to the prior determination of an issue by the state court judge.")

Once an issue has been decided, the law of the case doctrine permits issues to be reopened only where there is "substantially different evidence raised on subsequent trial; a subsequent contrary view of the law by the controlling authority; or a clearly erroneous decision which would work a manifest injustice." *United States v. Moored,* 38 F.3d at 1421 (internal quotations and citations omitted). "This rule of practice promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues."

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988).

In *Ellison v. Empire General Life Ins. Co.*, 919 U.S. 140 (6th Cir. 1990) (unpublished), this court expressly rejected the argument that the law of the case doctrine does not bind federal district courts sitting in diversity:

> Basically, the plaintiff argues that the law of the case established in a state court should not bind a federal district court sitting in diversity. This proposition is erroneous. The Supreme Court has clearly stated its support for applying law of the case doctrine. . . . The doctrine applies where a competent court has decided a rule of law and that issue is raised in subsequent stages of the same case, especially where the parties have had a full and fair opportunity to litigate. In general, the Court justifies application of law of the case doctrine because its application conserves judicial resources, saves adversaries from the expense and vexation of multiple lawsuits, and reduces the possibility of inconsistent opinions.
>
> These reasons justify application of the doctrine of law of the case to the case at bar. The case has involved extensive discovery at the state court level, was heard, and then appealed to the state appellate court. Upon remand, the case was further litigated, until plaintiff voluntarily withdrew her case and filed the same action in the state court of another county.
>
> While a reviewing federal court may reopen issues of law decided by a state court if the federal court is satisfied that the state court made a mistake in interpreting state law, we find no indication that the Ohio appellate court so erred in this case. Accordingly, we hold that the district court correctly accepted the findings of the Ohio appellate court and limited the issues at trial to those remanded by that court.

Id. (citations and footnote omitted).

In this diversity action, Birgel is bound (pursuant to the law of the case doctrine) by the state court's substantive finding

that he did not enter into an enforceable contract with the Board. As a practical matter, the dismissal of Birgel's action conserves judicial resources, limits the expense of multiple lawsuits, and reduces the possibility of inconsistent results.

Because the district court properly dismissed Birgel's breach of contract action pursuant to the law of the case doctrine, I would affirm for that reason alone.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Donald R. Birgel,
Plaintiff

vs. Case No. C-1-95-63

Board of Commissioners of
Butler County, Ohio,
Defendant

ORDER

On April 12, 1996, this court issued an order directing Plaintiff to show cause why this breach of contract action should not be dismissed on the basis of *res judicata*. The court observed that the issue of whether Plaintiff and Defendant had entered into a contract was finally decided against Plaintiff in the state courts and opined that that resolution barred Plaintiff from reasserting the breach of contract claim in this action.

In response to the show cause order, Plaintiff correctly observed that the state court did not enter a final judgment on the breach of contract claim. A party is not barred by *res judicata* or collateral estoppel from litigating a claim or an issue unless the claim or issue has been decided in a previous proceeding and that proceeding has resulted in a judgment on the merits. *Parklane Hosiery Co. v. Shore*. 439 U.S. 322, 326 n.5 (1979); *Detroit Police Owner's Association v. Young*, 824 F.2d 512, 515 (6th Cir. 1987).

The Court then directed Defendant to submit a motion for summary judgment as to Plaintiff's breach of contract claim. Defendant timely submitted such a motion and argued that Plaintiff was barred from relitigating the breach af contract claim in this Court pursuant to the doctrine of law of the case. Defendant also argued that Plaintiff could not produce evidence in support of his contention that the parties had entered a contract. The Court concludes that Plaintiff is barred from

relitigating his breach of contract claim by the doctrine of law of the case.

The procedural history of this case is, in all material respects, identical to that in *Ellison v. Empire General Life Insurance Co.*, No. 89-3879, 1990 WL 191630 (6th Cir. Dec. 3, 1990). In *Ellison*, the Ohio Court of Appeals decided a number of issues in the defendant's favor but remanded the case to the Court of Common Pleas for Cuyahoga County for resolution or other issues and ultimate disposition. After remand, the plaintiff voluntarily dismissed the action and refiled in the Court of Common Pleas for Summit County. The defendant then removed the action to the United States District Court for the Northern District of Ohio. That court concluded that Plaintiff was prohibited from relitigating issues that were decided by the Ohio Court of Appeals by the doctrine of law of the case.

Plaintiff appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. That court affirmed the district court's disposition. The appellate court stated as follows:

> "Basically, the plaintiff argues that the law of the case established in a state court should not bind a federal district court sitting in diversity. This proposition is erroneous. The Supreme Court has clearly stated its support for applying law of the case doctrine. In *Arizona v. California*, 460 U.S. 605, 619 (1983), the Court noted that . . . "a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive" (cit. omitted). The doctrine applies where a competent court has decided a rule of law and that issue is raised in subsequent stages of the same case, especially where the parties have had a full and fair opportunity to litigate. In general, the Court justifies application of law of the case doctrine because its application conserves judicial resources, saves adversaries from the expense and vexation of multiple lawsuits, and reduces the possibility of inconsistent opinions. *Montana*

v. United States, 440 U.S. 147, 153-54 (1979). *Id.* at **2

In this case, the Ohio Court of Appeals conclusively decided that Plaintiff had not stated or supported a claim for breach of contract. The Court stated that "the materials submitted by the plaintiff in support of his motion for summary judgment were inadequate to establish an enforceable contract." *Birgel v. Board of Commissioners of Butler County*, No. CA94-02-042, amended slip op. at 4. That court further stated that Plaintiff had failed "to present sufficient evidence to support the existence of a contract." *Id.* The court, nevertheless, remanded the action to the Court of Common Pleas for Butler County to permit Plaintiff to attempt to state a claim based upon an alternate theory. Plaintiff chose not to do so and, instead, filed the instant action for breach of contract.

Plaintiff does not argue that the breach of contract claim he asserts in this action, or the evidence in support thereof, differs in any respect from that asserted in the state courts. Rather, Plaintiff has attempted, by filing the same action in this Court, to obtain a different decision on the breach of contract claim. The possibility of such inconsistent decisions is one of the primary policies supporting the law of the case doctrine. *Montana v. United States*, 440 U.S. at 153-54. Because the issue was conclusively decided in the Ohio Court of Appeals, this court will not revisit it. Defendant's motion for summary judgment (Doc. 17) is therefore GRANTED. This action is DISMISSED.

IT IS SO ORDERED.

Sandra S. Beckwith
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Donald R. Birgel,
Plaintiff,

vs. Case No. C-1-95-63

Board of Commissioners of
Butler County, Ohio,
Defendant.

ORDER

On April 12, 1996, this court issued an order directing Plaintiff to show cause why this breach of contract action should not be dismissed on the basis of *res judicata*. The Court observed that the issue of whether Plaintiff and Defendant had entered into a contract was finally decided against Plaintiff in the state courts and opined that the resolution barred Plaintiff from reasserting the breach of contract claim in this action. In response to the show cause order, Plaintiff correctly observes that the state court did not enter a final judgment on the breach of contract claim. A party is not barred by *res judicata* or collateral estoppel from litigating a claim or an issue unless the claim or issue has been decided in a previous proceeding and that proceeding has resulted in a judgment on the merits. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); *Detroit Police Officers Association v. Young*, 824 F.2d 512, 515 (6th Cir. 1987). In the case of the state court action between these parties, it appears to the court that the only reason a final judgment on Plaintiff's breach of contract claim was not entered was that Plaintiff dismissed the action before the trial court could enter judgment. The issue of the existence of a contract had clearly been litigated to the extent that it would be and had been decided against Plaintiff. The state appellate court had signified its agreement with that

decision. Nevertheless, the Court recognizes that a literal application of the doctrines of collateral estoppel and *res judicata* precludes their application in this case.

The Court concludes that the legal issue of whether the parties entered into a contract is a significant threshold issue in this matter. The resolution of that issue may eliminate the necessity of a trial; however, the issue has not been fully briefed by the parties. Accordingly, the Court hereby Vacates the final pretrial and trial dates in this matter and directs Defendant to file a motion for summary judgment on Plaintiff's breach of contract claim on or before May 31, 1996. Plaintiff may respond on or before June 21, 1996, and Defendant may file a response on or before July 5, 1996. Once the Court has ruled upon the motion for summary judgment, new final pretrial and trial dates will be set, if necessary.

IT IS SO ORDERED.

Sandra S. Beckwith
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Donald R. Birgel,
Plaintiff

vs. Case No. C-1-95-63

Board of Commissioners of
Butler County, Ohio,
Defendant.

SHOW CAUSE ORDER

This action arises from Defendant's rescission of its acceptance of Plaintiff's bid to provide disability insurance coverage to Defendant's employees. Plaintiff sued in the Butler County Court of Common Pleas, which dismissed the action on the ground that Plaintiff could not state a claim for breach of contract because he had not entered into a contract with Defendant. The Ohio Court of Appeals affirmed that conclusion but determined that the action should not have been dismissed inasmuch as Plaintiff might be able to state a claim other than breach of contract based upon Defendant's actions. After the remand to the Court of Common Pleas, Plaintiff voluntarily dismissed the state court action and filed the instant action asserting a claim for breach of contract.

Having reviewed the record in this action, the Court concludes that Plaintiff's breach of contract claim is subject to dismissal on the basis of the doctrine of *res judicata*. Under Ohio law, the doctrine of *res judicata* provides that "a final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Johnson's Island Inc. v. Board of Township Trustees*, 69 Ohio St.2d 241, 243 (1982) (citation omitted) The doctrine acts as a bar to what was actually determined

in the prior suit and also to every other matter that properly might have been litigated, *Stromberg v. Board of Education*, 64 Ohio St.2d 98, 100 (1980), and may apply even if the second lawsuit states a different cause of action. *Johnson's Island*, 69 Ohio St.2d at 244. Accordingly, in order for the doctrine of *res judicata* to apply, (1) the judgment in the initial action must be final and on the merits, (2) by a court of competent jurisdiction, (3) the parties in the second action must be the same as or in privity with those in the first action, and (4) the matter must be one that was, or properly might have been, litigated in the initial action.

Applying Ohio's *res judicata* standard, the Court concludes that the claim by Plaintiff in this action against Defendant is the same as that asserted by Plaintiff against Defendant in the Butler County Court of Common Pleas. That court entered a final judgment on the claim, and the Ohio Court of Appeals agreed that Plaintiff could not state a claim for breach of contract. While the appellate court left open the possibility that Plaintiff might successfully assert a different claim on the same facts, Plaintiff did not do so. Accordingly, when Plaintiff voluntarily dismissed the state court action, no claims were pending and the only claim that had ever been asserted had been resolved finally and on the merits.

The Court hereby DIRECTS Plaintiff to show cause within fifteen days of the date of this Show Cause Order why this action should not be dismissed in light of the fact that Plaintiff's sole claim has been dismissed on the merits by a court of competent jurisdiction in an action between the same and Order or to Plaintiff's response hereto unless directed to parties. Defendant need not respond to this Memorandum do so by this Court.

IT IS SO ORDERED.

Sandra S. Beckwith
United States District Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

DONALD R. BIRGEL,

Plaintiff-Appellant,

- vs - CASE NO. CA94-02-042

BOARD OF COMMISSIONERS OF
BUTLER COUNTY, OHIO,

Defendant-Appellee. AMENDED OPINION

David A. Caldwell, 2500 Cincinnati Commerce Center, 600 Vine Street, Cincinnati, Ohio 45202-2409, for plaintiff-appellant Scheper & McGowen, Jack C. McGowen, 400 Dollar Federal Bldg., 2 S. Third Street, Hamilton, Ohio 45011, for the defendant-appellee.

KERNS, J. Plaintiff-appellant, Donald R. Birgel, commenced this action in the Butler County Court of Common Pleas claiming damages from defendant-appellee, Board of Commissioners of Butler County, Ohio, for an alleged breach of contract.

As shown by the record, the Board of Commissioners of Butler County ("Board") adopted a plan to provide county employees with access to disability insurance. Under the plan, the employees would have the option of paying the premiums through payroll deductions or paying the premium on their own.

Based upon the opinion of the prosecuting attorney, the Board decided to follow the competitive bidding procedures outlined in R.C. 307.86 *et seq.*, and on January 29, 1991 and February 5, 1991, the Board proceeded to advertise for bids on the project. The bids were opened on February 14, 1991, and Birgel's bid was accepted by resolution on March 28, 1991.

However, an unsuccessful bidder complained that the notice of the bidding procedure was defective, and on September 24, 1991, the Board adopted a resolution which rescinded the acceptance of Birgel's bid and provided for a new bidding

process. Subsequently, the Board readvertised for bids and finally accepted the bid of Mense Brothers.

On August 18, 1992, Birgel filed this action alleging that the Board breached his contract to provide disability insurance, and on November 9, 1993, he filed a motion for a partial summary judgment wherein he requested that the trial court find that the alleged contract was not subject to the competitive bidding requirements of R.C. 307.86 *et seq.*, and that the Board materially breached its contract with him to provide the insurance for the employees.

On February 3, 1994, the common pleas court entered a written decision wherein it overruled the plaintiff's motion for a summary judgment, and on the same date, the trial court entered its judgment as follows:

> Pursuant to the court's opinion of even date, we find that reasonable minds can come to but one conclusion on the facts in this case and that conclusion is adverse to this plaintiff and for that reason, we find there was no breach of contract on behalf of the defendants and for that reason, the plaintiff is without a cause of action. Accordingly, we hereby dismiss this action at plaintiff's cost.

In the present appeal, appellant has set forth his only assignment of error as follows:

> THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT WHO DID NOT FILE A MOTION SEEKING SUMMARY JUDGMENT.

In support of the alleged error, Birgel relies upon *Marshall v. Aaron* (1984), 15 Ohio St. 3d 48, where the syllabus provides that "Civil Rule 56 does not authorize courts to enter summary judgment in favor of a nonmoving party." However, the judgment of the trial court, as set forth herein, appears to be more in the nature of a dismissal for failure to state a claim under Civ.R. 12(B)(6), and this raises a much narrower procedural issue.

When judgment was entered, the cause was pending upon nothing more than Birgel's motion for a summary judgment,

and upon the record, this court is of the opinion that the motion was properly overruled by the common pleas court. However, such action did not conclude the matter, and the subsequent dismissal without notice was premature. See *Mayrides v. Franklin County Prosecutor's Office* (1991), 71 Ohio App.3d 381.

While the materials submitted by the plaintiff in support of his motion for a summary judgment were inadequate to establish an enforceable contract, he may have been able to amend his complaint to frame a cause of action for the damages he incurred as a result of the faulty bidding procedure. In other words, it does not appear beyond doubt that Birgel can prove no set of facts which might support his claim for damages in some amount. See *O'Brien v. University Tenant's Union Inc.* (1975), 42 Ohio St.2d 242.

A dismissal under either Civ.R. 12(B)6 or Civ.R. 56 operates as an adjudication on the merits, and even though the failure of the appellant to present sufficient evidence to support the existence of a contract substantially depreciates his claim for relief, he was nevertheless entitled to notice of the action that the trial court intended to take.

Accordingly, and in order to afford appellant an opportunity to be heard as to any remaining issue in the case, the judgment must be reversed and the cause remanded to the common pleas court for a resumption of the proceedings at the juncture where the motion of the appellant for a summary judgment was overruled. The assignment of error is sustained.

Judgment reversed and cause remanded.

JONES, P.J., and KOEHLER, J., concur.

Kerns, J., retired, of the Second Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

Donald R. Birgel,
Plaintiff,

vs.

CASE NO. CV92-08-1482

Board of Commissioners
of Butler County, Ohio,
Defendant.

OPINION

A

Moser, J.

This matter is before the Court on the plaintiff's motion for partial summary judgment wherein he asks:

1. that the contract for disability-income insurance described in the complaint be declared not subject to competitive bidding requirements as set forth in O.R.C. §307.86;

2. that the defendant's recision of the award of such contract to the plaintiff constituted a breach of contract.

After reviewing the arguments of counsel and exhibits in this matter, it is the court's opinion that the alleged contract for disability income insurance described in the complaint was not the subject of competitive bidding requirements as set forth in O.R.C. §307.86 and we further are of the opinion that the defendant's recision of the award of such contract to the plaintiff did not constitute a breach of contract, all for the reasons set forth below.

The facts in this case disclose that the County Commission adopted a plan wherein disability insurance would be made available to the county employees as individuals, allowing the individuals to pay the premiums through a payroll deduct- were set forth for prospective bidders. Those specifications included a disclaimer by the Commission of any liability or obligation on the County of Butler. The proposal for bids also stated that the contract was to be for a three-year duration with a review every three years by Butler County and insurance provider. Further, the following language was contained

in the request for bids:

> Prior, 120-day notice required for Butler County or insurance company to cancel contract for any reason.

The plaintiff was apparently the low bidder, or at least it was his insurance companies who were selected for purposes of offering disability-income insurance to county employees.

The request for proposals on this insurance plan was done on a competitive bidding procedure inasmuch as the prosecutor's office had advised the Commission that O.R.C. §307.86 required competitive bidding. It was then, on March 28, 1991, the County Commission adopted a resolution awarding the disability insurance "contract" to Plaintiff Donald R. Birgel.

Shortly after the award was made, a disappointed bidder, J. McCarty, complained to Assistant Prosecutor Pat Connelly. On May 24, 1991, the County Commission inquired again of Pat Connelly requesting an opinion as to the validity of the bidding process. It was then Connelly's opinion that the county's specifications for disability-income insurance were defective because of the lack of detail and further, because of the defective specifications, the award itself was defective. Connelly recommended the Commission rescind the contract with Birgel and on September 24, 1991, the Board did adopt a resolution rescinding its previous award of the contract to Birgel. The evidence establishes that the Commission's action was based solely on Connelly's opinion and not on any dissatisfaction with Birgel's performance.

After rescinding the plaintiff's "contract", the Commission re-advertised for bids which were opened on December 19, 1991, and the Commission ultimately accepted the bid of Mense Brothers.

We first address the issue of whether or not the disability-income insurance program, which was to paid for by employees through payroll deduction, is subject to competitive bidding as set forth in O.R.C. §307.86.

Sub judice, there was no purchase or acquisition of insur-

ance on behalf of the county. The county strictly solicited an insurance program for its employees and on behalf of the employees which did not involve any responsibility or expenditures by the County Commission. The purpose of competitive bidding is to maximize the purchasing value of public funds and provide a fair and equitable treatment to all persons involved in public purchasing. See, *Independant Taxi Cab Assn. of Columbus vs. Columbus Green Cabs, Inc.* (1992) 84 Ohio App. 3d, 361, 367. There were no public funds involved *sub judice*. While the *Columbus* case involved a city ordinance and its charter, which provided for competitive bidding, that ordinance read much like the state law so an analogy can be drawn irrespective of the fact that we are dealing with state law, *sub judice*. This analogy continues in that R.C. §307.86 and the City of Columbus ordinance read much the same inasmuch as both make reference to the "purchase" of materials or services. R.C. §307.86(F) specifically refers to the purchase of any form of insurance policy or contract which is authorized by Title 39 of the Ohio Revised Code. It is beyond dispute that the County Commission did not purchase an insurance contract. The County Commission simply sanctioned or authorized a given insurance agent to solicit the county employees with the further provision that the county employees, at their option, could pay premiums through payroll deduction. As a matter of fact, the County Commission never did enter into a contract. Rather, the Commission simply, by resolution, authorized the plaintiff to solicit county employees pursuant to Birgel's proposal.

Having concluded there were no public funds involved with Birgel and the Commission having disclaimed any obligation or liability on behalf of the county, we find that O.R.C. §307.86 (competitive bidding) was inapplicable to this case. See, Ohio Attorney General Opinion No. 91-051. Nevertheless, the county was not precluded from utilizing the competitive bid procedure.

In passing, we note that Assistant Prosecutor Connelly must have observed that the bid by Birgel was defective in

that he did not mention that two different insurance companies were involved, one for the Sheriff's employees and still another for the balance of the county employees. While we do not think our observations in this respect are a bit critical to our decision, we will, nevertheless, observe that the bid by Birgel included a copy of Monarch Insurance Company's policy and two premium rate schedules. The one premium rate schedule is clearly marked as being that of Benefit Trust. The other premium rate schedule is not identified as being either that of Benefit Trust or Monarch. While Birgel may have explained this to the Commission orally, it certainly is not self-evident from the materials submitted with the bid as to what insurance companies are involved or where.

B.

We next address a most critical area in this lawsuit and that being whether or not the County Commission breached a contract with Birgel.

If, indeed, there was a contract to purchase, we do not believe it was *ultra vires*. The Commission was indeed authorized to "purchase" any types of insurance regulated by Chapter 39 of the Ohio Revised Code. R.C. §3923.11 authorized insurance companies to offer sickness and accident insurance on a franchise plan. And, apparently, from the description of "franchise plan", that is exactly what Birgel proposed to do. However, as stated above, the County Commission did not purchase anything, they simply authorized Birgel to solicit the county employees. The County Commission was in effect extending a license to Birgel to solicit and the Commission put its imprimatur on the solicitation. We would be of the opinion that the mere agreement of the Commission to add its imprimatur upon a solicitation plan could not be *ultra vires* since a purchase of such insurance would have been a proper subject of a contract.

Now, we inquire into what extent the Commission obligated itself to Birgel. We read over the bid specifications and we find that the Commission was willing to add its imprimatur upon a solicitation plan meeting its approval for a period

of three years, while the successful licensee agreed to maintain its plan open to all Butler County employees for a period of three years. Of course, as previously mentioned, this three years was subject to be cut short to a period of 120 days by either party who wanted to cancel the contract for *any* reason. As a practical matter at the instance of notification of intent to cancel the imprimatur of the Commission ceases and Birgel is not likely to sell further insurance to the employees who will all know there is no payroll deduction 120 days henceforth. It is all but certain when the employees learn of the intent to cancel, they lose faith in Birgel and the thought of continued sales by Birgel becomes illusory. So--in passing, the Court observes where are the damages?[1]

The County was in effect extending a gratuity to Birgel. The Commission received nothing in return. Therefore, we ask: Could the Commission have reasonably anticipated that any "breaching or reneging" on their part would subject it to damages for loss of profits? If being subject to a cause of action for loss of profits was not within the contemplation of the parties at the time they entered into any agreement, there can be no such recovery. See, *Combs Trucking vs. International Harvester* (1984) 12 Ohio St. 3d, 241 and *The Midvale Coal Co. vs. Cardox Corp.* (1952) 157 Ohio St. 526. Assuming, as this court has, that the Commission was extending a gratuity to Birgel, the Commission nor Birgel could hardly have contemplated that the other would be responsible for money damages to each other, albeit Birgel could very well have

---

[1]The proof of future loss of profits is the subject of considerable judicial precedent in Ohio. It is not only the existence of such profits, but the amount as well, which must be proven with reasonable certainty. Lost profits must be substantiated by calculations based on facts available, otherwise they are speculative and uncertain. Conclusionary statements are not sufficient to establish future loss of profits. See, *AGF Inc. vs. Great Lakes Heating* (1990) 51 Ohio St. 3d, 177, *Rhodes vs. Rhodes Industries Inc.* (1991) 71 Ohio App. 3d, 797, and *Kinetico vs. Independent Ohio Nail* (1984) 19 Ohio App. 3d, 26.

been responsible to its insured, the county employees, under certain circumstances. We would agree with the defendants in this case, that the County was not offering to enter into a contract of its own, but merely inviting offers by interested parties as to terms upon which they would write policies for individual employees. We would, therefore, hold that the passing of the resolution authorizing Birgel to solicit county employees was not a contract and, therefore, the Commission could not be held liable for breach of contract.

Before we conclude this matter, we will make reference to any possible theory of estoppel which may, but has not, been asserted in this matter. Generally, promissory estoppel does not apply to state agencies and we believe that this equally apples to all governmental entities. See, *State ex. rel. Polaroid Corp. vs. Denihan* (1986)34 Ohio App. 3d, 204; *Sekerak vs. Fair Hill Mental Health Center* (1986) 25 Ohio St. 3d, 38; *Chevalier vs. Brown, Secretary of State* (1985) 17 Ohio St. 3d 61; *Griffith vs. J.C. Penney Co.* (1986) 24 Ohio St. 3d 112. Notwithstanding, we believe that promissory estoppel does not apply in this matter inasmuch as one of the essential elements in promissory estoppel is that the promise of a promissor should induce action or forbearance on [sic] part of the promissee resulting in injustice if the promise is not enforced. There is no evidence that Birgel forbore anything or committed him [sic] to such action which resulted in an injustice. The fact that Birgel may have lost a profit is not "action or forbearance resulting in injustice".

Accordingly, this court finds that reasonable minds can come to but one conclusion on the facts and that conclusion is adverse to the plaintiff and for that reason, the motion for summary judgment is not only denied, but leads us to the inevitable conclusion that if there is no breach of contract, there is no cause of action to be maintained by Birgel in this lawsuit. We, therefore, as a matter of law dismiss this action at plaintiff's cost.

John R. Moser, Judge